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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN TRUJILLO,

Defendant and Appellant.

B206578

(Los Angeles County
Super. Ct. No. BA279565)

APPEAL from a judgment of the Superior Court of Los Angeles County, Carol H. Rehm, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Stephane C. Brennan and Eric E. Raynolds, Deputy Attorneys General, for Plaintiff and Respondent.

Juan Trujillo appeals from the judgment entered after a court trial, during which he was found guilty of first degree burglary, two counts of forcible rape, forcible sodomy, and sexual penetration with a foreign object, with the findings that he committed the sexual assaults during the commission of a residential burglary with the intent to commit the alleged sexual crimes, while engaged in binding the victim, and with the use of a firearm. (Pen. Code, §§ 459, 261, subd. (a)(2), 286, subd. (c)(2), 289, subd. (a)(1), 667.61, subds. (a), (b), (d), and (e), 12022.53, subd. (b).)¹ The court also found various aggravating sentencing factors true. Defendant was sentenced to 53 years to life in state prison. His sole contention on appeal is that the court erroneously sentenced him to consecutive terms pursuant to section 667.6, subdivision (d).

FACTUAL AND PROCEDURAL BACKGROUND

As defendant appeals only his sentence, we set forth an abbreviated factual summary, focusing on the evidence underlying the sexual assaults.

On January 12, 2005, at approximately 7:50 a.m., M.O. returned home after driving her daughters to school. As she entered her home, someone grabbed her by the hair, pulled her inside, and closed the door. She saw the silhouette of a man dressed in black, wearing a ski mask, and holding a gun. The man pointed the gun at her head and took her into the bedroom. He put M.O. face up on the bed, placed a pillow over her face, and tied her wrists with shoelaces. She recalled that she was lying face down when he tied her, and her hands were behind her back.

As M.O. lay on her back with the pillow over her face, the man removed her pants and underwear and penetrated her vagina with his penis. He withdrew and reinserted his penis in her vagina several times. As M.O. struggled to breathe, she turned her head to the side and saw the gun lying on the bed. The man removed his penis and placed his fingers in M.O.'s vagina. At some point during the assault, the man covered her face

¹ All further undesignated statutory references are to the Penal Code.

with a pair of sweats that were on the bed. He then put his penis in her anus, but M.O. could not recall whether he repositioned her body to accomplish that act. M.O. later testified that the man penetrated her vagina several times, then inserted his penis in her anus, and following that act, inserted his fingers into her vagina. At first, she said the man penetrated her anus while she was lying on her back. Later, she said he placed his penis in her anus while she was lying face down.

M.O. said that she heard her neighbor's gate open, and the man guided her into the bathroom. He led her into the shower, closed the shower door, and closed the bathroom door. M.O. got out of the shower and locked the bathroom door. When she heard the front door to the residence open and close, M.O. left the bathroom and called 911.

M.O. testified that when she saw the silhouette of her attacker, she thought it was defendant. However, she did not want to believe that it was him because he was a member of her family. When the intruder took her into the bathroom, he placed his hand on her back in the same manner as defendant had on many occasions.

On cross-examination, M.O. recalled that the man touched her breasts and then placed her face down and tied her wrists. She recalled that she was face down during the time the man penetrated her, and could not remember if he ever sexually assaulted her while she was lying on her back. M.O. testified on a number of occasions that she was trying to forget the incident. She said that her memory of the events was probably fresher when she testified at the preliminary hearing than it was at the time of trial. (The preliminary hearing was held on June 28, 2005, and the trial was conducted in June and July of 2007.)

M.O. told Toni Zaragoza, the nurse who performed the sexual assault examination on M.O. shortly after the incident, that the man penetrated her anus with his penis and vagina with his fingers while M.O. was lying face down. Then the man turned her over, placed a pillow over her face, and inserted his penis in her vagina.

M.O. was also interviewed by Detective Gil Pacheco on the day of the assault. She told him that the man penetrated her anus and vagina with his penis while she was

face down on the bed. He then withdrew his penis, turned her on her back, and reinserted his penis into her vagina.

Evidence collected from M.O.'s vagina, anus, and right buttock was tested and found to contain semen. Through DNA testing, it was determined that the samples contained a mixture of DNA material. There were three contributors, M.O.'s husband, M.O., and defendant.

On January 30, 2008, following defendant's conviction, the court conducted a sentencing hearing. In imposing consecutive terms, the court stated: "Pursuant to Penal Code section 667.6 subparagraph (d), the court finds that, for purposes of counts 3, 4, and 5, Mr. Trujillo's actions did not demonstrate an indivisible course of conduct with a single intent an[d] objective, but rather, they involved a single victim on separate occasions because Mr. Trujillo had [a] reasonable opportunity to reflect on his actions as he repositioned [M.O.] but, nevertheless, reassumed his assaultive behavior." Defendant filed a timely appeal.

DISCUSSION

Defendant contends the trial court's finding that he had a reasonable opportunity to reflect before committing the various sex acts against M.O. is not supported by the evidence. He focuses on her testimony that the incident happened very quickly to argue that there was "no appreciable break between kinds of penetration." We disagree.

"Once a trial judge has found under section 667.6, subdivision (d), that a defendant committed offenses on separate occasions, we may reverse only if no reasonable trier of fact could have decided the defendant had a reasonable opportunity for reflection after completing an offense before resuming his assaultive behavior." (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1092.) Keeping that standard of review in mind, we examine the evidence presented at trial.

The testimony established that defendant, at gunpoint, placed M.O. on the bed, covered her face with a pillow, removed her clothing, and inserted his penis in her

vagina. On several occasions, he withdrew his penis from her vagina and reinserted it. He then withdrew his penis again, turned M.O. over, and inserted his penis into her anus. After committing that act, he put his fingers into her vagina. M.O. told Detective Pacheco that after defendant sodomized her, he placed her on her back and, again, placed his penis in her vagina. During the assaults, defendant covered her face with sweats, suggesting that the pillow was no longer on M.O.'s face, and fondled her breasts. Thus, defendant repositioned M.O., inserted his penis into different parts of her body, penetrated her with different parts of his body, and fondled her breasts. This series of events afforded defendant an ample opportunity to reflect on his actions before continuing to assault M.O. We cannot say that no reasonable trier of fact could have reached that conclusion.

Defendant's reliance on *People v. Pena* (1992) 7 Cal.App.4th 1294 is misplaced. There, the victim testified that Pena raped her, got off her, twisted her by the legs, and orally copulated her. (*Id.* at p. 1299.) The court found that the defendant did not have a reasonable opportunity to reflect upon his actions, even though he had to change positions after raping his victim in order to orally copulate her, "especially where the change [was] accomplished within a matter of seconds." (*Id.* at p. 1316.) It concluded that "nothing in the record before this court indicates *any* appreciable interval 'between' the rape and oral copulation." (*Ibid.*) The facts in that case are quite different than those present here. As described above, defendant did more than simply change positions to accomplish his purpose. He withdrew and inserted his penis into different parts of M.O.'s body, fondled her breasts, and, not satisfied with violating her with his penis, penetrated her vagina with his fingers.

Nor is defendant's cause advanced by *People v. Corona* (1988) 206 Cal.App.3d 13. In that case, in addressing whether two of the defendant's crimes fell within the purview of section 667.6, subdivision (d), the Attorney General conceded "'it is difficult to argue that the oral copulation and foreign object rape, occurring just prior to the rapes, are themselves separate episodes.'" (*Id.* at p. 16.) The court accepted that concession

and went on to conclude that consecutive sentences were properly imposed under section 667.6, subdivision (c). (*Ibid.*)

Defendant complains that the Attorney General relies on the testimony of Nurse Zaragoza and Detective Pacheco to establish the nature of the sexual assault. He contends that their testimony consisted of M.O.'s prior inconsistent statements and suggests that the only evidence this court may consider in determining whether the trial court's sentence is supported by the record is M.O.'s testimony at trial. He is mistaken.

The lynchpin of defendant's analysis is that the prosecution relied solely on M.O.'s testimony to gain a conviction and the trial court relied upon that evidence alone in sentencing him. Thus, he urges that it would be unfair for this court to consider Zaragoza's and Pacheco's testimony because it is inconsistent with the prosecution's theory of the case and, in any event, constitutes "hearsay statements not offered as proof of their truth—*i.e.*, as proof of the exact nature of the crime committed." Not so. Defendant's assertion that the prosecution relied solely on M.O.'s testimony to establish his guilt is simply incorrect. In light of her admission that she tried to forget the incident and that her recollection of the events was fresher shortly after they occurred as opposed to at the time of trial, the prosecution presented evidence of earlier, perhaps more accurate, accounts of the attack that M.O. provided the police and hospital personnel. His assertion that M.O.'s prior statements were admissible for impeachment purposes only illustrates a basic misunderstanding of the hearsay rule. Generally, evidence of a statement made by someone other than a witness in court may not be admitted if it is offered to prove the truth of the matter stated. (Evid. Code, § 1200.) The testimony of Zaragoza and Pacheco was admitted pursuant to the hearsay exception contained in Evidence Code section 1235, and may be considered as substantive evidence of the offenses defendant committed. (*Jogani v. Jogani* (2006) 141 Cal.App.4th 158, 174.) Defendant's claim that this court cannot consider M.O.'s prior statements in reviewing his sentence is without merit.

The trial court did not err in imposing consecutive sentences.

DISPOSITION

The judgment is affirmed.

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SUZUKAWA, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.